In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1844

MARION BRUCE PHELPS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Northern District of California, petitioner was convicted of having sold (Counts II and III) and possessed with intent to distribute (Count IV) quantities of a schedule III controlled substance (to wit phencyclidine hydrochloride (PCP)), in violation of 21 U.S.C. 841(a)(1). He was sentenced to a term of three years' imprisonment on each count, the sentences to run concurrently. The court of appeals affirmed (Pet. App. A).

1. The facts show that on January 27, 1972, Special Agent Eldon Olson, acting in an undercover capacity, met one Reynold DeFreitas in Hayward, California to negotiate the purchase of a quantity of phencyclidine hydrochloride (PCP). Olson again met with DeFreitas on February 2, 1972, who introduced him to Dennis Wood; the three negotiated for the purchase of one ounce of PCP for $800. The following day, Defreitas delivered 35.2 grams of PCP for which Agent Olson paid him $800.

On February 24, 1972, Agent Olson met with Wood to arrange for a second sale. Wood offered to sell the agent three ounces of PCP for $2,300 and placed a telephone call in the agent's presence dialing 343-6604;[1] he spoke to a person he referred to as "Bruce," and arranged for the delivery of PCP.

Shortly thereafter, surveillance agents observed petitioner depart from 2815 Hillside Drive, Burlingame and meet with Wood. Wood then returned and delivered 88.4 grams of PCP to Olson for which he paid $2,300.

The final sale took place on March 21, 1972, with Wood and petitioner engaging in the same procedure outlined above. After Wood met with petitioner, he returned to the agent and delivered five ounces of PCP for which Olson paid him $3,400. Petitioner was then observed returning to the Hillside Drive address.[2]

Based on these facts, federal agents obtained search warrants for petitioner's residence and three other locations in Northern California.[3] The warrants were executed simultaneously on April 4, 1972. At approximately 1:00 p.m., Special Agent Olson, in the company of other federal agents, went to the front door of petitioner's residence while other officers fanned out to the side and rear of the

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[1]Subsequent investigation revealed that this phone number was for the residence at 2815 Hillside Drive, Burlingame, California.

[2]Both Wood and DeFreitas entered pleas of guilty and were sentenced to terms of three years' imprisonment.

[3]Following a hearing the district court suppressed the use of evidence obtained by the government in execution of search warrants and arrest warrants at a location in Garberville, California and suppressed the use of evidence taken from the person of co-defendant William Franklin incident to his arrest in Hayward, California (Pet. App. D).

house (M. Tr. 230-232).[4] Olson testified at the hearing on petitioner's motion to suppress that he knocked on the door at least twice and loudly announced that he was a federal agent with a search warrant (M. Tr. 232, 237). Olson received no response, but "heard movement" (M. Tr. 234). After a wait of approximately five to ten seconds he knocked a second time and again announced his purpose and identity (M. Tr. 232-234). Special Agent Olson testified that he waited another five to ten seconds before forcibly entering the front door (M. Tr. 234); upon entering the residence he found petitioner in the kitchen (M. Tr. 235). Petitioner appeared to Olson to be slow to react, listless, and to be recovering from a dose of some drug. Olson further testified that shortly after observing petitioner, the second group of agents effected a forcible entry through the side door (M. Tr. 235, 244-245).

Petitioner testified that he was in the kitchen when Olson and other agents burst into the room and arrested him (M. Tr. 252, 254). He stated that he heard no prior knocking, nor did his dog respond in a manner he would have expected had there been knocking (M. Tr. 255).

As a result of the subsequent search, the agents seized various controlled substances including PCP, cocaine, lysergic acid (LSD), and marijuana. Also seized were certain necessary chemical formulae for the manufacture of illicit drugs, and $7,896 in cash including currency which Special Agent Olson had given Wood during one of the transactions.

2. Petitioner's sole contention is that in the course of executing a warrant for the search of petitioner's house, federal agents violated 18 U.S.C. 3109, which provides as follows:

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[4]"M. Tr." designates the three-volume transcript of the hearing on petitioner's motion to suppress, copies of which are being lodged with the Clerk of this Court.

BREAKING DOORS OR WINDOWS FOR ENTRY OR EXIT.

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

This contention was carefully considered and rejected by the district court and the court of appeals, upon whose opinions we rely. The district court, after receiving testimony and affidavits, denied petitioner's motion to suppress, finding (Pet. App. D, xii-xiii):

> According to one federal agent, he knocked twice on the wooden front door of the residence, with five second waits after each knock, heard some dogs barking, announced his authority and purpose and then broke the door open, entered the premises, arrested the defendant, Phelps, and searched the premises. According to the testimony of a second federal agent, who was assisting at a side door, he heard the announcement at the front door and also a commotion there—but heard no dogs. Then the agents at the side door knocked on the door, announced their authority and purpose and, receiving no response, broke the side door and entered to assist in the arrest and search.
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> Although there are some discrepancies in the testimony of the federal agents and, although the two-fold breaking seems to have been unnecessary, the evidence is such that the Court cannot say that, under the circumstances, the agents did not wait long enough, as strongly contended by defendants, to determine whether they were being refused admittance—

> actually or constructively. We find that Section 3109 was substantially complied with. The motion to suppress is denied.

As petitioner acknowledges (Pet. 9-10), the federal agents were not required to await an express refusal before forcibly entering petitioner's residence after their announcement of purpose and authority remained unheeded. Here, as we have noted above, after knocking and loudly announcing their identity and purpose twice, and receiving no response, the officers heard the sound of "movement." In these circumstances, they could reasonably conclude that the occupants were seeking to escape and that they were being refused admittance; accordingly, the forcible entry was proper. See *United States* v. *Allende*, 486 F. 2d 1351, 1353 (C.A. 9), certiorari denied *sub nom. Montoya* v. *United States*, April 22, 1974, No. 73-5854; *United States* v. *Woodring*, 444 F. 2d 749 (C.A. 9).[5]

Contrary to petitioner's claim, the decision of the Seventh Circuit in *United States* v. *Pratter*, 465 F. 2d 227, is not in conflict with the holding in this case. In *Pratter*, customs agents went to defendant's residence with a warrant. While knocking on the door and announcing his purpose, an agent turned the door knob, found it unlocked, and entered the premises. The court concluded

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[5]Petitioner stresses the fact that here the officers waited only ten to fifteen seconds after knocking before they broke open the door. However, 18 U.S.C. 3109 imposes no set period of time which federal officers must wait prior to using force. Indeed to require officers to wait any specified time after an implied refusal would merely serve to permit destruction of evidence or facilitate escape. See *United States* v. *Allende*, *supra*, 486 F. 2d at 1353; *Jackson* v. *United States*, 354 F. 2d 980, 982 (C.A. 1); *United States* v. *West*, 328 F. 2d 16, 18 (C.A. 2).

that the entry was not in compliance with Section 3109 because no special circumstances existed from which a refusal could be inferred. In contrast, in the instant case circumstances existed from which the agents could conclude that they were being refused admittance. As the court of appeals (Pet. App. A, iii-iv), found:

> A daytime entry into appellant's residence in Burlingame was made by three federal narcotics agents who had warrants authorizing, respectively, the search of the premises and the arrest of appellant. One of the agents, at approximately 1:00 p.m., knocked at the front door of appellant's residence at least twice and loudly announced that he and the others with him were federal agents with a search warrant for the premises. After hearing dog-barking and movement, but no other response, he forced open the door, entered the residence and in the kitchen found appellant who appeared slow to react, listless and apparently recovering from a dose of some unknown drug. An interval of five to ten seconds elapsed between the time that the agent first knocked and announced his identity and purpose and the time that he repeated this procedure; thereafter, another five to ten seconds elapsed and the agent then forced open the door and entered the premises. Another federal agent was at a side door of the premises, heard shouting at the front door, and entered the premises after the front door was forced and after the agents there made their entry.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.

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